SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 317

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MARY A. HUFFMAN,
*Petitioner and Appellant Below,*

*vs.*

THE CITY OF WICHITA,
*Respondent and Appellee Below.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### Opinion Below.

In the District Court of Sedgwick County, Kansas, the Court of first instance, a jury was waived, that court made findings of fact and conclusions of law (R. 69) which reflect its opinion and the opinion of the Supreme Court of Kansas (R. 134), the highest court of the State, is reported in 151 Kans. 679. This opinion was filed April 6, 1940 (R. 134), within twenty days thereafter petitioner filed her motion for rehearing (R. 146) which was denied by the Supreme Court of Kansas on May 10, 1940 (R. 173) and the decision thereupon became final.

## II.

### Jurisdiction.

Jurisdiction of this Court is invoked under

(1) Article III of the Constitution of the United States,

(2) The Fourteenth Amendment to the Constitution of the United States,

(3) Paragraph (b) Sec. 344, Title 28 U. S. C. A. (R. S. Sections 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 52 Stat. 366; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937.)

The applicable Federal Statute which fixes and defines the undertaking in a supersedeas bond on appeal to this Court is 28 U. S. C. A. 869 (R. S. 1000) which reads as follows:

> "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Rule 36 of this Court, so far as material here, reads as follows:

> "In cases where an appeal may be had from a state court of last resort to this court the same may be allowed in term time or in vacation by the chief justice or presiding judge of the state court or by a justice of this court. The judge or justice allowing the appeal shall take the proper security for costs and sign the requisite citation and he may also, on taking the req-

uisite security therefor, grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal. See Rev. Stat. secs. 1000 and 1007 (28 U. S. C. secs. 869, 874), paragraph 1 of Rule 10, paragraph 2 of Rule 46, and Equity Rule 74, 226 U. S. Appendix p. 22. For stay pending application for review on writ of certiorari see Rule 38, paragraph 6.

"2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good."

This Court has jurisdiction to entertain this appeal (*Martin* v. *Hunter*, 1 Wheat. 304) and the cases relied on by petitioner to sustain the jurisdiction and to warrant the relief prayed are as follows:

*Bein et al.* v. *Heath*, 12 How. 168;
*Hovey* v. *McDonald*, 109 U. S. 150;
*Yick Wo* v. *Hopkins*, 118 U. S. 356;
*Knox County* v. *Harshman*, 132 U. S. 14;
*Tulloek* v. *Mulvane*, 184 U. S. 497;
*Ah Sin* v. *Wittman*, 198 U. S. 500;
*Merrimac River Savings Bank* v. *City of Clay Center*, 219 U. S. 527;
*Woolfolk* v. *Jones*, 216 F. 807;
*Derrington* v. *Conrad*, 7 Kan. Appeals 295;
*Cook* v. *Smith*, 67 Kans. 53.

## III.

### Statement of the Case.

The case in its broad outlines is stated under subdivision A of the Petition for Certiorari, which statement will not be here repeated.

The Amended Petition of the case (R. 6) sets forth five causes of action, two of which were abandoned, the case

being submitted and tried on the first cause of action which sought to recover $60.00 per cab for thirty-four taxicabs operated from December 29, 1934 through December 31, 1934; the second cause of action which sought to recover $60.00 per cab for thirty-four taxicabs operated from the 1st day of January, 1935 to and including the 3rd day of January, 1935, and the fourth cause of action which sought to recover $30.00 per cab for twenty-five taxicabs operated from January 4, 1935 to June 14, 1935, which latter date was the date this Court dismissed the appeal in the former case.

The applicable city ordinance (Exhibit K, No. 11-254 effective date December 29, 1932) (R. 119) which was in force from its effective date to January 4, 1935, and provided for a license fee of $60.00 per taxicab per annum, was relied on as fixing the measure of liability under the first and second causes of action. The applicable city ordinances relied on as fixing the measure of liability under the fourth cause of action was Exhibit L, Ordinance No. 11-428, effective date January 4, 1945 (R. 120) which provided for a semi-annual license fee of $30.00 per cab and further provided that when cabs were substituted for previously licensed cabs an additional license tax of only $5.00 should be paid for such substituted cab.

The trial court in its amended findings of fact and conclusions of law (R. 67) found that thirty-four cabs had been operated from December 28, 1934 to December 31, 1934; that thirty-four cabs had been operated from January 1, 1935 to January 3, 1935, and that after January 4, 1935, twenty-five additional cabs were put on under the ordinance providing for semi-annual license fees and these figures formed a basis for the judgment. The trial court further found (Finding of Fact 8-b, R. 72) as follows:

> "For the first six months of the year 1935 the City of Wichita only collected from operators of taxicabs the sum of $30.00 as license fees for the period be-

ginning January 1, 1935, and ending at midnight June 30, 1935. Of the twenty-five taxicabs which were endorsed on the policy of insurance given by The Home Cab Company subsequent to January 3, 1935, twenty of such cabs were replacements in lieu of so many of the thirty-four cabs as were endorsed on the companys policy from January 1, 1935 to January 3, 1935, inclusive, making a total of thirty-nine (39)."

The amended petition was attacked by demurrer (R. 20) on the ground that it did not state facts sufficient to constitute a cause of action in favor of the City and against petitioner. The sufficiency of plaintiff's evidence was challenged by demurrer, the grounds not being specified (R. 41).

The point that there was no stay order and hence no restraint was raised by petitioner's requested Conclusion of Law No. 6 (R. 64); the point that there was no restraint was raised by petitioner's requested Conclusion of Law No. 7 (R. 64); the point that no adequate measure of damage has been proven was raised by petitioner's requested Conclusion of Law No. 8 (R. 64); the discriminatory application of the ordinance was raised by petitioner's motion for amended and supplemental finding No. 4 (R. 75) which the court sustained by making finding No. 8-b, *supra,* and the point that the liability was sought to be enforced under an ordinance passed subsequent to the giving of the bond appeared in finding No. 8, as well as from the ordinance itself. Petitioner moved to set aside this finding in paragraph 3 of her motion to set aside findings of fact, etc. (R. 74).

Petitioner also moved for judgment on the record and special findings (R. 76), such motion being identical as to the first, second and fourth causes of action, "for the reason that the same fail to show liability in favor of the plaintiff and against the defendant, Mary A. Huffman" (R. 76).

That no damages had been proven and that the terms and conditions of the bond were insufficient in fact and law

to entitle the City to recover, were raised by the third, fourth and fourteenth grounds of the motion for a new trial (R. 77).

The notice of appeal (R. 84) covered all the foregoing except the overruling of the demurrer to the amended petition.

The point that there was no proof of damages was raised by a challenge of the record (R. 87).

In addition to the trial errors the specifications of error in the Supreme Court of the State of Kansas (R. 88) raised the want of restraint, the want of proof of damages and the lack of right to recover the damages claimed under the bond.

The Federal character of the questions, the want of restraint, the necessity for pleading and proof of consequential damages, the fact that petitioner was sought to be held to the provisions of an ordinance not passed at the time of giving her bond, and the discriminatory application of the ordinance to her were also raised by the motion for rehearing (R. 147).

The net result of the case from petitioner's standpoint is that by virtue of her execution of the supersedeas bond on December 29, 1934, the liability on which terminated on June 14, 1935, when this Court dismissed the appeal, she is held liable for license fees for thirty-four taxicabs operated during the year 1934, at the rate of $60.00 per cab, for thirty-four taxicabs operated during the first three days of 1935, at the rate of $60.00 per cab, and for twenty-five taxicabs operated subsequent to January 3, 1935, at $30.00 per cab. She was thus held for two years license fees for thirty-four cabs although the trial court found that for the year 1935 the City only collected $30.00 per cab from other taxicab operators for the first six months' period in that year and was further held liable for license fees for twenty-five cabs at the rate of $30.00 per cab under an ordinance

which was passed after she gave her bond, twenty of these cabs being replacements and as such only required to pay a license fee of $5.00 under the very ordinance fixing the $30.00 fee for which appellant was held liable.

## IV.

### Specifications of Error.

1. The Supreme Court of Kansas erred in finding and holding that any restraint existed.

2. The Supreme Court of Kansas erred in finding and holding that an undertaking to pay the license fees should be read into the bond and that such undertaking when so read into the bond was enforcible.

3. The Supreme Court of Kansas erred in finding and holding that the City was entitled to recover the license fees from petitioner without pleading or proof that the failure to collect the license fees from the cab company was caused by the restraint.

4. The Supreme Court of Kansas erred in finding and holding that petitioner was liable for license fees from January 1, 1935, to January 3, 1935, at the rate of $60.00 per taxicab, for the reason that such ordinance, although general in terms, was only enforced against petitioner and not against others in like situation with the principal obligor on the bond.

5. The Supreme Court of Kansas erred in finding and holding that under a supersedeas bond given on appeal to this Court, license fees could be recovered which were fixed by an ordinance passed subsequent to the giving of the bond. As an alternative assignment, the Supreme Court of Kansas erred in finding and holding that petitioner's liability for twenty substituted cabs was not limited to $5.00 per cab.

V.

**Argument.**

Petitioner's argument heretofore advanced in the trial court and the Supreme Court of Kansas may be summarized as follows:

VI.

**(a) Summary of Argument.**

It is respectfully submitted that the decision of the court below is

**Point A.**

Contrary to and in conflict with the decisions of this Court which hold that in order for restraint to exist there must be a stay order and that restraint does not flow from the mere giving of a supersedeas bond.

**Point B.**

Contrary to and in conflict with the decisions of this Court which hold that the liability on a supersedeas bond on appeal from the highest court of a State to this Court, in a case such as this, is limited to consequential damages which must be pleaded and proven.

**Point C.**

Contrary to and conflicting with the decisions of this Court which hold that the liability on a supersedeas bond is limited to consequential damages in that a liability was enforced against petitioner as surety under an ordinance which, although general in its terms, was attempted to be enforced against petitioner alone and not enforced against others in like situation with the principal obligor on the bond.

**Point D.**

Contrary to and in conflict with the decisions of this Court which hold that the liability on a supersedeas bond is limited to consequential damages in that a portion of the liability and a portion of the license fees which appellant was adjudged to pay, arose under a city ordinance passed subsequent to the giving of the bond and for that reason will not be included in the undertaking of the bond; and, in the alternative, if a liability is to be enforced against petitioner under such subsequently passed ordinance, she is entitled to the benefit of the provisions of the ordinance which provides the license fee of only $5.00 per cab for substituted cabs, of which there were twenty in this case.

VII.

**Argument in Support of Point A.**

The decision is contrary to and in conflict with the holdings of this Court in *Hovey* v. *McDonald et al., supra, Knox County* v. *Harshman, supra,* and *Merrimack River Savings Bank* v. *City of Clay Center, supra,* where it was held that when a stay is not granted, the decree of the lower court retains its intrinsic force and effect notwithstanding that a supersedeas bond may be given. It is not believed necessary to amplify this point further, for, insofar as counsel are aware, the point is not doubtful.

The Supreme Court of Kansas apparently concedes that it issued no stay order and the opinion would seem to hold that the bond executed by appellant in and of itself had the effect of continuing a temporary injunction order issued by the court of first instance.

On page 685 of its opinion, the Supreme Court of Kansas says:

> "Appellant insists the bond it posted in this court did not revive the original injunction order. The bond

it posted in order to perfect its appeal from the decision of this court continued the effect of the injunction."

As will be observed, no case was cited and so far as counsel are aware, no case will be found supporting this view. The question is not one of State law and it is within the exclusive power of Congress, and of this Court, to fix, regulate and determine the conditions for the exercise of the appellate jurisdiction of this Court. It is not competent for the Supreme Court of Kansas to say that the giving of a supersedeas bond on appeal to this Court has the effect of continuing in force an injunction order issued by an inferior State Court. Neither Congress nor this Court have ever attached such consequences to the giving of a supersedeas bond. The question is one of Federal law. *Tullock* v. *Mulvane, supra.*

**Argument in Support of Point B.**

The decision is contrary to and conflicting with the decision of this Court in the case of *Omaha Hotel Company* v. *Kountze, supra,* holding that superadded conditions incorporated into the provisions of a supersedeas bond are not enforcible.

In this case, the Supreme Court of Kansas by judicial interpretation, superadded a condition to the bond. It undertook to do this by the process of declaring that the condition in the bond to the effect that the principal and surety would "answer all costs and damages if it shall (not) make good its plea", was an undertaking to pay the license fees.

That court said in its opinion:

> "What damages did the parties intend the bond should cover? We think any doubt on that subject which may result from a construction or interpretation

> of the letter of the bond is completely resolved by the facts and circumstances surrounding its execution. Those facts and circumstances have been narrated. They compel the conclusion a bond in the sum of $11,000 was required by this court for the express purpose of protecting the city in the collection of license fees, in the event the cab company should not make good its plea."

It is difficult for petitioner to follow this reasoning. She is unable to determine whether the court regarded the intent of the parties as controlling, or the intent of the Supreme Court of Kansas as controlling. In either event, it is submitted that the decision is wrong for it is for Congress and this Court, and not the parties or the State Court, to determine what undertaking shall be sufficient to bring a case to this Court for review. The right of appeal to this Court cannot be made to depend upon the will of the parties or the intention of the State court.

Under the *Omaha Hotel Company* case, the condition that the Supreme Court wrote into the bond by interpretation would not have been enforceable even if it has in terms been incorporated into the bond, much less can it be enforced if it was not in the bond.

Under its professed views, the Supreme Court of Kansas, of course, found no reason to consider the necessity of pleading and proof of consequential damages. This is necessary, as the cases show. An illustrative case from the lower Federal courts is *Woolfolk* v. *Jones, supra.* Prior to the decision in this case, the rule of the *Omaha Hotel Company* case was also the law in Kansas. *Cook* v. *Smith, supra, Derrington* v. *Conrad, supra, Cook* v. *Smith* was strikingly similar on its facts to this case, the court holding that lack of an averment that the damage was caused by the delay rendered a petition for recovery on the bond demurrable. Although cited and discussed in the brief,

these Kansas cases were ignored by the Supreme Court of Kansas. Be that as it may; the question is not one of local law but Federal law and the rule of *Omaha Hotel Co.* v. *Kontze* is believed controlling.

**Argument in Support of Point C.**

In *Yick Wo* v. *Hopkins, supra,* and *Ah Sin* v. *Wittman, supra,* the rule is announced and applied to the effect that an ordinance, although valid on its face may not be enforced in a discriminating manner. In this case it was expressly found by the trial court (Finding 8-b, R. 72) that other taxicab operators in like situation were permitted to pay only a $30.00 license fee per cab for the first six months of 1935, while judgment in this case on the second cause of action was rendered against petitioner for a $60.00 license fee per cab on account of operation of cabs for three days. Such judgment was not only unwarranted by principles of consequential damages, but also was in violation of petitioner's rights under the 14th Amendment.

**Argument in Support of Point D.**

In the original restraining order issued by the trial Court, the City was restrained "from enforcing any of the provisions of Ordinance No. 11-180 *or the amendments thereto*" (R. 49). There was other similar language in the order. Both the trial Court and the Supreme Court of Kansas appear to have held that this language applied to amendments subsequently enacted. The Supreme Court of Kansas in its opinion says:

> "It is finally urged the judgment is erroneous as to the amount of damages recoverable under the respective causes of action. The findings of fact, upon which the conclusions of law were based, are supported by substantial evidence. This is true as to the ordi-

nances *and the amendments thereof,* (Italics ours) which the city was enjoined from enforcing."

That the order only related to amendments already enacted, of which there were several, appears obvious.

However, even though this Court should permit the Supreme Court of Kansas to err in its interpretation of this order the point still remains that the condition was an unreasonable one and not authorized by Federal law.

The courts had no way to control the City's action in advance and such action could not be anticipated. To say that in order to seek redress in this Court one must insure payment of license fees that may thereafter be imposed at the whim of a municipal body is to interpose an unsurmountable barrier to the right of appeal to this Court.

## VII.

### Conclusion.

Aside from its importance to petitioner, this case is believed to present questions of public importance. For if a State court by its decision may attack prohibitive conditions to appeals to this Court, as was done in this case, the right of appeal will be an empty one.

WHEREFORE, it is respectfully submitted that your petitioner's prayer for the issuance of a writ of certiorari be granted.

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